IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE SEARS LEWIS, JR.,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 21234

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

WILIAM P. COPPLE
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

SUBJECT INDEX

CITATIONS

CASES

TEXTS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOE SEARS LEWIS, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 21234

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

I.
JURISDICTIONAL STATEMENT OF FACTS

Appellee adopts the Appellant's Jurisdictional Statement of Facts.

II.
STATEMENT OF FACTS

Appellee adopts Appellant's Statement of Facts generally, but wishes to point out the following: that of the six witnesses

for Appellee who identified the Appellant, the one who was not a bank employee, Mr. Alwyn C. Kuhn, recognized the Appellant as having seen him in the bank the morning of the robbery, but Mr. Kuhn left the bank prior to the robbery and returned after the robbery. (Reporter's Transcript, page 19, lines 5-21). The robbery occurred prior to eleven o'clock in the forenoon (RT 19, L9). Government's Exhibit 14 was admitted into evidence, which was a monthly telephone bill of Appellant's sister, Jaxie Young, who testified she called from her home in Gila Bend to her parent's home in Tucson, Arizona, at 2:06 p.m. on April 29, 1965 (RT 68, L 7 to 69, L 1, Government's Exhibit 14). Mrs. Young also identified Government's Exhibit 17 as belonging to her father (RT 69, L 3-4).

(It was stipulated by the parties that Government's Exhibit 17 was the property of Appellant and was last in his possession on January 7, 1966. Government's Exhibit 17 is a forty-five caliber revolver with an over all length of approximately fourteen inches and with nickel plating which has peeled off in spots).

Govenment's Exhibit 17 was identified by Rose Hill as being like the gun the Appellant was carrying (RT 80, L 17-21), by Ruth Arm (RT 90, L 20-25), by Ruth Klavano (RT 99, L 22 to RT 100, L 5), and by Maurice Tansey (RT 112, L 19 to RT 113, L 8). (Neither Miss Maria Placko nor Mr. Alwyn Kuhn saw the Appellant with a gun the day of the robbery and, of course, were not shown Government's Exhibit 17).

All six of the identifying witnesses testified they identified the Appellant in a line-up consisting of a total of six people on January 11, 1966; their identification was made in writing without discusion among them (Alwyn Kuhn RT 19, L 25 to RT 20, L 8; Maria Placko, RT 72, L 11 to RT 73, L 2;

Rose Hill, RT 82, L 4-23; Ruth Arm, RT 91, L 19 to RT 92, L 8; Ruth Klavano, RT 101, L 5 to RT 102, L 11; Maurice Tansey, RT 113, L 9-24). Ruth Arm testified no other witness to the robbery, other than the six named Government witnesses, were present at the line-up. (RT 95, L 22 to RT 96, L 5).

The "alibi" of Appellant submitted by Appellant was circumstantial. Appellant offered the testimony of Arthur Murray, who testified that one day in April, 1965, at noontime, the Appellant came to his home and asked him to come over to the home of Appellant's parents to see some kitchen cabinets Appellant had painted (RT 166). Mr. Murray estimated the painting would take four to five hours (RT 168, L 17-20). The other witnesses put him in Gila Bend on the evening of April 28, 1965 (Carol Kelly, RT 128-129; and Jaxie Young, RT 147, L 15-21), and that he left Gila Bend for Tucson between eleven and twelve at night on April 28, 1965, (RT 147, L 23-24). The Appellant testified that it was Thursday, April 29, 1965, that he painted the cabinets (RT 182, L 15-23).

The Appellant also offered the testimony of Carol Kelly that on Wednesday, April 28, 1965, she saw the Appellant at a grocery store in Gila Bend and that he needed a haircut since she is used to very short crop hair (RT 129, L 12-19).

The testimony of Lois Spence was offered as well, that Appellant's hair was short at the end of April, 1965 (Lois Spence, RT 133, L23 to RT 134, L 6; RT 136, Lr). On cross-examination Alwyn C. Kuhn stated the bank robber, whom he had identified as the Appellant, had long side burns and needed a hair cut (RT 22, L 13-20). Maria Placko testified she saw only the back of his hair (RT 74,, L 6-11). Rose Hill stated that she didn't notice his hair (RT 83, L 6-8). Ruth Arm stated

his hair was long in back, but not extremely long (RT 92, L 17-25). Ruth Klavano testified his hair was longer down his head and he needed a hair cut (RT 102, L 25 to RT 103, L 4). Maurice Tansey testified he didn't see any hair (RT 114, L 19 to RT 115, L 1).

The Appellant testified his permanent residence was St. Regis, Montana, in April, 1965 and at the time of trial he had arrived in Tucson, Arizona, in the middle of March to take care of his parents (RT 176). He spent the time finding a place to care for his parents, and thereafter was cleaning up their house, with trips back and forth to his sister's house in Gila Bend (RT 176-183). He testified he saw Lois Spence and Arthur Murray on Thursday, April 29, 1965, when he was painting the kitchen cabinets and that he was alone (RT 183). Lois Spence testified the day in April that she saw Appellant at the home of his parents he was painting and his parents were there (RT 134, L 2-19). Lois Spence stated this was the only time she saw the Appellant (RT 137, L2-4).

The Appellee offered the testimony of Eve Simpson, who testified she had taken care of Appellant's parents who first came to her home on the afternoon of April 26, 1965 (RT 38, L 11). She related that she kept records, and further, because they were new to her she was able to recall (RT 39, L 1-3). She related what occurred on April 27th and 28th (RT 39, L 15 to RT 40, L 22). On the next day, April 29, the parents asked to be driven to their home around ten in the morning and they did not find the Appellant at home (RT 41, L 18 to RT 42, L 17).

III.
OPPOSITION TO SPECIFICATIONS OF ERROR

1. There was no error in permitting questions of Appellant concerning his return to St. Regis, Montana in May of 1965, the car he was driving and of the money he had when he returned.

2. The Trial Court's clarification of Appellant's Counsel's question was not a comment and therefore no error.

3. There was no error in the Court's instructions and Appellant's counsel had the opportunity to request an instruction on alibi.

IV.
SUMMARY OF ARGUMENT

1. The cross-examination of Appellant's return to St. Regis, Montana was a proper area of inquiry, in view of the direct testimony of Appellant.

2. The purpose of the question of the Trial Court was to clarify the question of Appellant's counsel, and did not constitute comment.

3. At the close of all the instructions the Trial Court gave Appellant's counsel the opportunity to request additional instructions and the Appellant did not request any.

V.
ARGUMENT

1. The cross-examination of Appellant's return to St. Regis, Montana was a proper area of inquiry in view of the direct testimony of Appellant.

Appellant testified on direct as follows:
By Mr. Waterfall:

"Q. And what is your permanent residence?

"A. St. Regis, Montana.

"Q. Where was that residence in April of 1965?

"A. St. Regis, Montana.

"Q. And did you come to Tucson in April of 1965?

"A. Well, I think I arrived sometime around the middle of March actually.

"Q. And what was the purpose of that visit?

"A. I'd been requested to come down and help do something about my folks and my sister." (RT 176, L 11-20.

The cross-examination was as set out in Appellant's Brief and concerned the return trip. The entire cross-examination of Appellant is set out therein.

Appellant cites three decisions of this Circuit: *Young Ah Chor v. Dulles,* (9th Cir., 1959), 270 F. 2d 338; *United States v. Johnson,* (9th Cir., 1960), 285 F. 2d 35; and *Enriquez v. United States,* (9th Cir., 1961), 293 F. 2d 788.

The rule as stated in *Young Ah Chor v. Dulles,* supra, at page 342, is as follows:

"[7-11] Subject to certain exceptions, the cross-examination of a witness should be limited to matters embraced in the examination in chief. Aplin v. United

States, 9 Cir., 41 F 2d 495; Chevillard v. United States, 9 Cir., 155 F 2d 929. One exception to this rule is that cross-examination may be permitted for the purpose of testing the capacity of the witness to remember, to observe, to recount, and for the purpose of testing the sincerity and truthfulness of the witness. This may be done with respect to subjects not strictly relevant to the testimony given by the witness on direct examination. The extent of the cross-examination is a matter within the discretion of the trial court. United States v. Bender, 7 Cir., 218 F. 2d 869; United States v. Manton, 2 Cir., 107 F. 2d 834. 'The extent to which cross-examination upon collateral matters shall go is a matter peculiarly within the discretion of the trial judge. And his action will not be interfered with unless there has been upon his part a plain abuse of discretion.' United States v. Manton, supra, at page 845. . . ."

He stated his permanent residence was St. Regis, Montana, and his residence in April of 1965 was St. Regis, Montana, but that the purpose of his trip to Tucson in the middle of March, 1965, was to help do something about his parents and his sister. The questions on cross-examination concerned his return from this trip.

The Appellant testified he did not go near the El Con Branch of The Arizona Bank on that morning, (RT 182, L 24 to RT 185, L 3), in other words, that he didn't rob the bank.

It is respectfully submitted the inquiry as to his return trip to St. Regis was within the scope on direct. Further, it was not an abuse of discretion for the Court to permit it. It tested the capacity of the witness to remember, recount and to test his truthfulness.

2. The purpose of the question by the Trial Court was to clarify the question of Appellant's counsel, and did not constitute comment.

To put the question of Appellant's counsel in context the questions and answers immediately preceding should be quoted:

"Q. Now, Mr. Tansey, would you for me, please, describe the other persons that you saw in this lineup on January 11th, 1966?

"A. No, I wouldn't be able to describe all of them. One in particular I remember was a very apparently well-dressed gentleman of medium height and build, who reminded me of someone I have seen before.

"Q. Does any—any of the other ones you recall?

"A. I cannot recall specifically.

"Q. Do you recall what clothing they were wearing?

"A. No, I can't.

"Q. Do you recall whether they had suits on or just T-shirts?

"A. One man, the one I mentioned earlier, was dressed in a suit. As far as I remember, the others were in different garbs; nothing in particular.

"Q. Now, Mr. Tansey, after you observed this lineup, did you have occasion to discuss what you saw with the other persons who were down there at the lineup?

"A. Yes. We drove down—or drove back together.

"Q. Together. And did that discussion reassure you that your identification was correct?

"A. No, I wouldn't say it reassured me, but I was certain.

"Q. Now, Mr. Tansey, did you see whether the culprit had a shirt on or not underneath the coat? Could you see a shirt?

"A. No, I did not.

"THE COURT: When are you speaking of, Mr. Waterfall?

"MR. WATERFALL: Whether the culprit had a——

"THE COURT: When? At the bank, at the lineup or——

"Q. (By Mr. Waterfall) I am talking about at the bank, what you observed at the bank.

"A. I do not recall a shirt."

(RT 117, L 5 to RT 118, L 11).

When the Government rested, the following took place at the side of the bench out of the hearing of the jury, after Appellant had moved for judgement of acquittal, and the motion was denied:

"MR. WATERFALL: Your Honor, also, I am going to move for a mistrial on the grounds that there was a referance by the Court to the person at the lineup as being the culprit, and I don't believe my own questioning led to that comment.

"MISS DIAMOS: I don't recall the——

"THE COURT: I don't recall it either, but I asked you what you meant by your prior question or 'when? At the bank or the lineup?', and when you said, 'At the bank.'

"MR. WATERFALL: As I recall, you said, 'You saw the culprit approximately—when you saw the culprit, where are you referring to? At the lineup or the bank?'

"THE COURT: Well, if I said 'culprit', I was quoting your question. The motion is denied." (Emphasis supplied) (RT 124, L 18 to RT 125, L 7).

It is respectfully submitted that the characterization of this question as "comment" is without merit.

3. At the close of all the instructions the Trial Court gave Appellant's counsel the opportunity to request additional instructions and Appellant's counsel did not request any .

At the close of all the instructions by the Trial Court, the Court asked:

"Do counsel have anything further?

"MISS DIAMOS: Nothing further, Your Honor.

"MR. WATERFALL: Nothing further, Your Honor.

"THE COURT: Will you swear the Bailiff, Mr. Clerk?

"(Whereupon the Bailiff was sworn in by the Clerk)

"THE COURT: Members of the jury, the indictment in the case and the exhibits that have been received in evidence will all be collected and sent up to the jury room. . . .

"The jury is now ready to retire to deliberate, so at this time the Court excuses from further service the two alternate jurors. . . ." (RT 245, L 6 to RT 246, L1).

Appellant's counsel states at the top of page 16 of the Opening Brief:

"No instruction was offered or requested by Appellant's counsel on the subject of alibi. It was assumed that such an instruction was among the general instructions given by the Court in all such cases."

Appellant was given the opportunity to request additional instructions at the close of all the instructions; he did not take it. He cannot now complain. *Holm v. United States,* (9th Cir., 1963), 325 F. 2d 44, at page 45.

Appellant has not brought himself within the special circumstances rule of the State Court, except that it was the main or sole defense, as set out in 118 ALR 1303, at pages 1310-1311.

The Trial Court instructed as follows:

"I instruct you that the identity of the defendant as the person who committed the crime is an element of every crime. Therefore, the burden is on the Government to prove beyond a reasonable doubt not only that the crime charged was committed but also that the defendant was the one who committed it.

"You must establish beyond a reasonable doubt the accuracy of the identification of the defendant by the witnesses Kuhn, Placko, Hill, Arm, Klavano and Tansey. If facts and circumstances have been introduced into evidence which raise

a reasonable doubt as to whether the defendant was the person who committed the crime charged, then you should find the defendant not guilty of the offense." (RT 242, L 1-13).

With this instruction, it is respectfully submitted, there could be no doubt, and further, the Appellant is the only one who testified he painted cabinets on April 29, 1965. The witness Arthur Murray couldn't give the day. There was no alibi established as such.

Appellant argues that the deliberation of the jury was five hours. It should be pointed out that shortly before the return of the verdict, the jury, through the foreman, asked the Court in writing if the testimony of Alwyn Kuhn was stricken. They were brought into open Court with the Appellant and both counsel present. The question was answered that the testimony of Alwyn Kuhn was not stricken. (RT 247, L 17 to RT 250, L 10).

VI.
CONCLUSION

The cross-examination of Appellant was within the scope of matters raised on his direct examination. The Trial Court did not comment on the evidence in attempting to clarify the question of Appellant's counsel. The instructions of the Trial Court were sufficient with no request by Appellant when he had the opportunity to do this. It is respectfully submitted the judgement should be affirmed.

Respectfully submitted,

WILLIAM P. COPPLE
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

JO ANN D. DIAMOS
Assistant United States Attorney

Three copies of the within Brief of Appellee mailed this 24 day of October, 1966, to:

GORDON G. WATERFALL
1015 Pheonix Title Building
Tucson, Arizona
Attorney for Appellant